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Supreme Court of the United States

October Term, 1958.

No.840

PEARL HOLEMAN, Administratrix of the Estate of Floyd Holeman, - *Petitioner,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Respondent.*

AND

PEARL HOLEMAN, - - - - - *Petitioner,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Respondent.*

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

I. THE OPINION IN THE STATE COURT.

The Opinion of the Court of Appeals of Kentucky is reported in 319 S. W. 2d 47, and a copy of the Opinion has been attached to the Petition for A Writ of Certiorari.

II. JURISDICTION OF THE COURT.

Jurisdiction of the Court is invoked under the provisions of 28 *U. S. C. A.* 1257(3) since the question involved concerns the Hepburn Act, 49 *U. S. C. A.* 1(7) (see Appendix).

III. THE QUESTIONS PRESENTED FOR REVIEW.

A. Did the Court of Appeals of Kentucky, as well as the Trial Court, correctly follow the law as set forth in *Francis* v. *Southern Pacific Company*, 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611, to the effect that the provisions exempting the Railroad from liability for negligence upon gratuitous passes were enforceable.

B. Were the passes issued to Floyd Holeman and Pearl Holeman gratuitous passes within the meaning of the Hepburn Act, 49 *U. S. C. A.* 1(7), thereby making the provisions on the pass exempting the Railroad from liability for negligence enforceable.

IV. COUNTER-STATEMENT OF THE CASE.

With certain exceptions the statement of the case by the Petitioner is correct. However, we would like to point out several additions and corrections.

The passes issued to Mr. & Mrs. Floyd Holeman (Mrs. Holeman's Exhibit 3, Praytor Exhibit 1) contained the following language limiting liability for negligence:

> "This pass is not transferable, and is void if presented by any other than the person or persons

shown thereon or if any alteration, addition, or erasure is made on it.

"The person accepting and using it thereby assumes all risk of accident to person or property, states that he or she is not prohibited by law from receiving free transportation and agrees to make only such use of the pass as is permitted by federal and state laws."

Pass No. 47629 (1953-1954) was issued to "Floyd E. Holeman, Clerk, L. & N. R. R. Co.", in 1953 (T. R. 129). Pass No. 47630 (1953-1954) was issued to "Mrs. Floyd E. Holeman, Wife of Clerk, L. & N. R. R. Co." in 1953 (T. R. 89, 147). Both of these passes are annual passes and were issued prior to the time Mr. Holeman was assigned to New Orleans, Louisiana (T. R. 89, 147) in 1954. There is no evidence in this case that these passes were issued to Mr. & Mrs. Holeman in consideration of the assignment to New Orleans as set forth by the Petitioner on page 4.

Mr. Holeman presented these passes to the conductor and signed a Term Pass Signature Slip for transportation on these two passes for him and his wife (Praytor Exhibit 2).

Mr. Holeman was employed (T. R. 42) in New Orleans by the New Orleans Union Terminal Company. While so employed by them, complete control over his movements rested with the New Orleans Union Terminal Company (T. R. 176) and not with the Louisville and Nashville Railroad Company. The New Orleans Union Terminal Company had control

over the hours when he worked and what work he performed (T. R. 91). Mr. Holeman's seniority rights were protected by being retained on the payroll of the Louisville and Nashville Railroad Company (T. R. 92) while he was on loan to and employed by the New Orleans Union Terminal Company. This arrangement was made only to protect his seniority (T. E. 92). The Louisville and Nashville Railroad Company was reimbursed by the New Orleans Union Terminal Company for all of Mr. Holeman's salary and expenses (T. E. 89). While in New Orleans, Mr. Holeman rendered no service to the Louisville and Nashville Railroad Company (T. E. 92).

It is not true, as stated on page 4 of the Petitioner's Brief, that it was "understood" that Mr. Holeman would return to Louisville from time to time during his service to the Union Terminal. The testimony is exactly the opposite. Mr. Weber (T. E. 133), Holeman's co-worker, was asked by counsel if there was any understanding between him and the officials of the Company, who assigned him to New Orleans, that he would be permitted to travel back and forth between New Orleans and Louisville on occasional visits. Mr. Weber answered that there wasn't any kind of understanding at all, and there weren't any conversations about it. Mr. Weber (T. E. 170), when he returned to Louisville, would not go to the Home Office of the Louisville and Nashville Railroad Company because, "when I came to Louisville, I didn't even go around the office, because I had no connection."

The Petitioner has neglected to state the purpose of the Holemans' trip from New Orleans to Louisville on which the accident occurred. This was over (T. R. 177) a 4th of July weekend, and the office in New Orleans of the Union Terminal Company was to be closed for three days. The sole purpose of the trip from New Orleans to Louisville was personal and for pleasure. Mrs. Holeman testified (T. R. 50, 180) that the trip to Louisville was for the purpose of visiting her daughter in Louisville. No effort was made to control the off-time of Holeman by either the Union Terminal Company (T. R. 176) or the Louisville and Nashville Railroad Company (T. R. 77). Mr. & Mrs. Holeman maintained living quarters in New Orleans (T. R. 181).

An annual Pullman pass was requested for Mr. Holeman, but if such a pass had not been procured, the New Orleans Union Terminal Company would have paid for this service (T. R. 92). It is true that the management of the Railroad had established an overall policy concerning passes. But there is nothing in any labor contract, nor in any agreement, concerning the issuance of passes to employees. There is no obligation on the part of the Louisville and Nashville Railroad Company to issue a pass (T. R. 121-123). A pass may be withdrawn at any time nor need it be issued.

As to the Pullman Company, it is true there is (Burke Exhibit 1, T. R. 119) an agreement between the Pullman Company and the Railroad Company. However, while the Pullman Company was sued in

this case a summary judgment was given in favor of the Pullman Company (T. R. 35) and no appeal has been prosecuted against it. There is no proof that the Louisville and Nashville Railroad Company received any money from the Pullman Company under its contract, nor that it had to pay any less deficit because the only fare here paid was a one-half fare by Mrs. Holeman ($3.44; T. R. 88).

While Mrs. Holeman did not sign her pass, she was aware of the conditions of the pass, and she had traveled on this pass many times (T. R. 148). The Holemans did not use their pass in going to New Orleans when Mr. Holeman was first assigned there as they drove to New Orleans in their automobile (T. R. 148).

V. ARGUMENT.

A. The Petition for a Writ of Certiorari Should Be Denied Because the Court of Appeals of Kentucky Followed the Law as Set Forth by This Court in Francis v. Southern Pacific Company, 333 U. S. 445, 92 L. Ed. 798.

The Petition for a Writ of Certiorari should be denied because this case is governed by the decision in *Francis* v. *Southern Pacific Company,* 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611. The Court so states plainly in its Opinion (page 2a). Thus, under *Rule 19 of the Supreme Court Rules,* this petition should be denied because the Kentucky Court has followed the decisions of this Court.

B. Should Francis v. Southern Pacific Company, 333 U. S. 445, 92 L. Ed. 798, Remain in Effect.

It is respectfully submitted that this case is controlled by *Francis* v. *Southern Pacific Company*, 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611. The problem here involved was studied thoroughly by this Court, and the decision rendered in 1948. The *Francis* case, *supra*, is supported by numerous cases to the effect that the Federal law preempts the field on the question of liability under passes, and that there will be no liability if there is an excluding phrase in the free pass for damages from ordinary negligence. *Northern Pacific Railway Company* v. *Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Boering* v. *Chesapeake Beach R. Company*, 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742; *Charleston & Western Carolina Railway Company* v. *Thompson*, 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476; *Kansas City Southern R. Company* v. *Van Zant*, 260 U. S. 459, 43 S. Ct. 176, 67 L. Ed. 348.

The provision for the exemption from liability for negligence has been applied in other jurisdictions to a member of an employee's family who has a gratuitous pass. *Ketchum* v. *Denver & Rio Grande Western R. Company*, 175 F. 2d 69, 71 (C. A. 10th); *Donnelly* v. *Southern Pac. Company*, 18 Cal. 2d 863, 118 P. 2d 465, 468; *Louisville & N. R. Company* v. *George*, 279 Ky. 24, 129 S. W. 2d 986, 987; *Pinnell* v. *St. Louis-San Francisco R. Company*, 263 S. W. 182, 185 (Mo.); *Plant* v. *Thompson*, 359 Mo. 391, 221 S. W. 2d 834, 835; *Wilder* v. *Pennsylvania R. Company*, 245 N. Y. 36,

156 N. E. 88; *Spanable* v. *New York Cent. R. Company*, 69 N. E. 2d 441 also 70 N. E. 2d 233 (Ohio); *Atchison, T. & S. F. R. Company* v. *Smith*, 39 Okla. 157, 132 P. 494; *O'Brien* v. *Atlantic Coast Line*, 99 Fla. 843, 128 So. 9.

Recovery has also been denied when the employee has been the recipient of the pass and has been injured or killed. *Francis* v. *Southern Pacific Company, supra*; *Kansas City Southern R. Company* v. *Van Zant*, 260 U. S. 459, 467, 67 L. Ed. 348, 350, 43 S. Ct. 176, reversing 289 Mo. 163, 232 S. W. 696; *Smith* v. *Atchison, T. & S. F. R. Company*, 194 F. 79 (C. A. 8th); *Bergerson* v. *Great Northern R. Company*, 158 Minn. 20, 196 N. W. 670, 671; *Williamson* v. *Seaboard Air Line R. Company*, 136 Va. 626, 118 S. E. 255, 256; *Atlantic Greyhound Lines* v. *Skinner*, 172 Va. 428, 2 S. E. 2d 441; *Wright* v. *Central of Georgia Ry. Company*, 18 Ga. App. 290, 89 S. E. 457; *Ft. Wayne & Wabash Valley Traction Company* v. *Justus*, 186 Ind. 464, 115 N. E. 585, 587. Compare *Louisville & N. R. Company* v. *Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297 reversing 133 Ky. 652, 118 S. W. 982.

The Court of Appeals of Kentucky has followed the decisions of the Supreme Court in its Opinion in this case and as noted in *Louisville & N. R. Company* v. *George*, 279 Ky. 24, 129 S. W. 2d 986, 987, the question before a State Court concerning exemption from liability under the provisions of free passes will be determined under the decisions of the Supreme Court of the United States. The parties here involved were traveling from New Orleans, Louisiana, to Louisville,

Kentucky, and thus, were engaged in interstate travel. Therefore, since the passes were free, under the Kentucky case of *Cincinnati, N. O. & T. P. Ry. Company* v. *Hansford,* 305 Ky. 854, 205 S. W. 2d 346, 347, the matter was to be determined under the Hepburn Act, 49 *U. S. C. A.* 1(7), and this became a matter of Federal law under which the Kentucky Court was bound by the holding in *Francis* v. *Southern Pacific Company supra,* by this Court.

It is respectfully submitted that the review of the legislative history of the Hepburn Act contained in the majority opinion of *Francis* v. *Southern Pacific Company, supra,* in the light of the previous decisions of the Court adequately sustained the position of the Court. No step has been taken by Congress in any way to amend the Hepburn Act in order to overrule the holding in *Francis* v. *Southern Pacific Company, supra.* Therefore, both on the reason as stated in the Opinion, and upon the fact that Congress has not acted contrary to the case, *Francis* v. *Southern Pacific Company, supra,* should remain in full force and effect.

C. The Passes Involved in the Present Case Under the Provisions of the Hepburn Act, 49 U. S. C. A. 1(7), Were Gratuitous Passes.

The Petitioner has argued that the passes involved were not gratuitous passes, but that they were issued as a result of long service, and, therefore, were part of the compensation of the employee. These passes were issued in 1953 (T. R. 147) before it was contemplated sending Holeman to New Orleans. The argument here

presented was made in the *Francis* v. *Southern Pacific Company,* 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611, as shown by the dissenting opinion in 333 U. S. 445, 467-469, 68 S. Ct. 611, 621-622. But this argument was rejected by the majority of the Supreme Court, and it was specifically held the pass was a "free" one and a gratuity, even though issued to an employee because he was such an employee. 333 U. S. 445, 449, 68 S. Ct. 611, 613. The same argument, as is made here by the Petitioner was rejected by the Supreme Court in the *Francis* case, *supra,* in view of the failure of Congress to make any change in the Act after its decision in *Northern Pacific Railway Company* v. *Adams,* 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Boering* v. *Chesapeake Beach R. Company,* 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742; *Charleston & Western Carolina Railway Company* v. *Thompson,* 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476; *Kansas City Southern R. Company* v. *Van Zant,* 260 U. S. 459, 43 S. Ct. 176, 67 L. Ed. 348. Thus, clearly under the decisions of this Court the passes issued here to Mr. & Mrs. Holeman were "free passes" and a gratuity for under 49 *U. S. C. A.* 1(7) only free passes can be issued to "its employees and their families" without criminal penalty.

The arguments made in Petitioner's petition were before the Supreme Court in *Francis* v. *Southern Pacific Company, supra,* as illustrated in a dissenting opinion. However, these arguments were rejected. The rule in the *Francis* case, *supra,* is that where an employee of a common carrier was riding on a free pass,

and the free pass provided that the user assumed all risk of injury to his person whether by negligence or otherwise, the carrier would not be liable to the holder of the pass for damages caused by ordinary negligence and has the same defense against the passenger's heirs in an action from wrongful death of the passenger.

This Court specifically pointed out at 333 U. S. 445, 447, 68 S. Ct. 611, 612, that the employee and his wife were riding on a free pass on a personal trip. The Tenth Circuit in its opinion in this case entitled *Francis* v. *Southern Pacific Company,* 162 F. 2d 813, 815-816, pointed out that Francis was an employee of the Southern Pacific Company and because of being such employee, he and his wife were issued free passes. At page 815 it is also noted that Francis and his wife were also in a Pullman car occupying a berth.

The *Francis* case, *supra,* is identical to the present case. The purpose of the trip to Louisville, Kentucky, was to visit their daughter on the 4th of July. The trip was a personal one, and had no connection with Railroad business. These term passes had been granted and could be accepted or rejected by the employee. They were not part of the consideration of his employment for there is no labor contract involved, and Petitioner's argument was specifically rejected by the Supreme Court in the *Francis* case, *supra,* because it was stated:

> "Thereafter in 1914 the Court held that the rule of the Adams case was applicable under the Federal Statute and that the 'free pass' was none-

theless a gratuity though issued to an employee of the carrier."

In support of this the Supreme Court cited *Charleston & Western Carolina Railway Company* v. *Thompson*, 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476. The effect of the *Thompson* case is clearly shown when the State Court decision, which the Supreme Court reversed, is examined for the State Court in its opinion decided the case for the plaintiff based on the same argument that is made here in *Charleston & W. C. Ry. Company* v. *Thompson*, 13 Ga. App. 528, 80 S. E. 1097, 1101, on the ground that the issuing of such passes *was considered to be part of the compensation* of the employee. But the Supreme Court reversed in the above cited case and held that the pass was not such compensation. In *Wright* v. *Central of Georgia Ry. Company*, 18 Ga. App. 290, 89 S. E. 457, 458, the annual pass issued to an employee of long service was held "gratuitous", and the limitation of liability held valid based on the *Thompson* case from the Supreme Court. Thus, the "consideration" argument has been consistently refuted. See *Dunn* v. *Alton R. Company*, 88 S. W. 2d 224, 231 (Mo.); *Atlantic Greyhound Lines* v. *Skinner*, 172 Va. 428, 2 S. E. 2d 441. It is also to be noted that in the *Francis* case the decedents were a man and wife, the husband an employee of the Railroad just as we have here. *Francis* v. *Southern Pacific Company, supra*, was decided in 1948. It is respectfully submitted that this opinion overrules in principal *Sassaman* v. *Pennsylvania R. Company*, 144 F. 2d 950, which was decided in 1944.

In addition, the *Sassaman* v. *Pennsylvania R. Company* case, *supra,* is not applicable in that it did not involve interstate transportation. The Kentucky Court of Appeals in *Cincinnati, N. O. & T. P. Ry. Company* v. *Hansford,* 305 Ky. 854, 205 S. W. 2d 346, has ruled on most of the issues here presented concerning the effect of whether or not the pass is gratuitous. On page 347, that Court distinguished the *Sassaman* case, *supra,* correctly and that distinction applies here. The Kentucky Court stated:

> "The Court there distinguished a case of that nature from a case where the employee is traveling for his own *personal pleasure or other personal* reasons."

The Kentucky Court further stated at page 347:

> "It does not follow because the appellee was traveling to his home that he was not taking the trip for his own personal pleasure or other personal reasons. He was certainly not commuting from Stearns to Mt. Carmel to perform his work each day."

The same is certainly the situation here in any light that is placed on the facts. Mr. Holeman had not been ordered to take this trip by either the New Orleans Union Terminal Company or the Louisville and Nashville Railroad Company. He was coming to Louisville solely for the purpose of seeing his daughter. This is certainly a personal reason. He was not commuting back and forth to New Orleans. He and his wife had living quarters in New Orleans, and they originally drove there by automobile.

Other Courts have held that such annual passes or term passes, as are involved here, are "free transportation within the provisions of the Hepburn Act, and the exemption of liability may be properly made." *Wright* v. *Central of Georgia Ry. Company,* 18 Ga. App. 290, 89 S. E. 457. Such a pass, even though issued as a result of long service, is a convenience to the employee, and the Court of Appeals of Georgia held such a pass was undoubtedly gratuitous. Compare *Turek* v. *Pennsylvania R. Company,* 361 Pa. 512, 64 A. 2d 779, 781 (annual pass). To the same effect no recovery was allowed to a wife of an employee who had been issued an annual pass. *Ketchum* v. *Denver & Rio Grande Western R. Company,* 175 F. 2d 69 (C. A. 10th). In the present case the issuance of these passes could not have been an inducement to take the job in New Orleans for the passes here involved were issued long before Mr. Holeman was approached for that job. Secondly, he and his wife drove by automobile to New Orleans (T. R. 148), and the issuance or non-issuance of the pass had nothing to do with his arriving at New Orleans to perform his function for the New Orleans Union Terminal Company.

Petitioner's reliance upon *Martin* v. *Greyhound Corporation,* 227 F. 2d 501 (C. A. 6th), is misplaced because that case is not controlling here. There the employee was traveling on a pass to which he was entitled, not as a matter of grace, but under the terms of a written contract between his union and his employer for his benefit. The question of willful and wanton negligence was also involved. The Court of

Appeals for the Sixth Circuit pointed out at page 503 in the *Martin* case, *supra,* that the fact situation was different from that of *Charleston & Western Carolina Railway Company* v. *Thompson,* 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476. This Court had specifically stated in the *Thompson* case, *supra,* that there was no obligation on the Railroad to issue the pass. Therefore, the liability limiting provisions of the pass were enforceable. In the *Martin* case there was a contractual relationship, and an obligation on the part of the carrier through the union contract to issue the pass. Thus, on the very grounds stated in the *Martin* case the rule to be applied here is that of *Charleston & Western Carolina Railway Company* v. *Thompson, supra,* and not the rule in *Martin* v. *Greyhound Corporation, supra.*

In addition, the *Martin* case, *supra,* does not address itself to the question of whether, in view of the Hepburn Act, a pass issued to an employee or a member of his family as a result of a specific provision in a contract of employment is valid. There is authority to the contrary in *Dunn* v. *Alton R. Company,* 88 S. W. 2d 224, 231 (Mo.); *Payne* v. *Elliott,* 77 Ind. App. 415, 133 N. E. 751, 752. See *Louisville & N. R. Company* v. *Mottley,* 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297 reversing 133 Ky. 652, 118 S. W. 982, where a contract for annual pass for life in settlement of claim for damages was held illegal as *contra* to the Hepburn Act. Therefore, since there was no valid consideration, such a pass must be "free".

New York Cent. R. Company v. *Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627 (1873), is not applicable for as pointed out at page 633 the drover had cattle on the train, and he was required, although he paid a fare for the transportation of the cattle and himself, to sign an agreement to "attend to the loading, transporting, and unloading of his cattle, and to take all risk of injury to them and of personal injury to himself, or whoever went with the cattle; and received what is called a drover's pass, certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the trail". The agreement stated this was done in consideration of carrying the cattle at less than tariff rates, but at the trial it was shown that the rate involved was three times the normal rate. Thus, the case is actually one of a fare paying passenger agreeing to a limitation of liability. It is true the Court held the limitation could not be enforced, but this is a case of fare paying passenger being forced into a limitation of liability agreement which is against public policy. The case was so treated by the Supreme Court, and certainly, is not applicable here. This is clearly shown by the fact that the Kentucky Court did not hold it applicable in *Louisville & N. R. Company* v. *George*, 279 Ky. 24, 129 S. W. 2d 986, 988, when the same factual situation was present as here.

Grand Trunk Railway v. *Stevens*, 95 U. S. 655, 24 L. Ed. 535, is not applicable because plaintiff was a passenger for hire. Plaintiff, not an employee of

the Railroad, was requested to go to Montreal to see the superintendent of the car department about the plaintiff's car coupling which he desired to sell to the railroad. The railroad offered to pay all his expenses to which plaintiff agreed. Pursuant to this agreement the pass was issued. The Supreme Court held plaintiff a passenger for hire because "His expenses in making the journey were to be paid by the defendant, and of these the expense of his transportation was a part". Here a contract was made with a stranger, and it was the same as if the railroad had given him the money to buy a ticket. Thus, the pass was issued in consideration of services. Secondly, plaintiff was on a trip on the railroad's business, and not one for his own personal pleasure as here. Also, as pointed out in *Charleston & Western Carolina Railway Company* v. *Thompson*, 234 U. S. 576, 58 L. Ed. 1476, 1479, the question is whether the pass is "free" under the Hepburn Act. Such passes as are here involved that are issued to employees on an equal basis are "free", and not issued in consideration of services.

Norfolk Southern R. Company v. *Chatman*, 244 U. S. 276, 61 L. Ed. 1131, is not applicable for a drover who was accompanying horses was involved, and the drover was held to be a passenger for hire to whom the limitation of liability was void. However, the Supreme Court on page 284 (1136) was careful to reaffirm *Charleston & Western Carolina Railway Company* v. *Thompson, supra*, pointing out that there a gratuitous pass was involved, issued without consideration, to a member of a family of an employee. Thus, the

situation here involved is expressly pointed out as different from the rule in that case.

It is clearly set forth in the evidence that there was no obligation on the part of the Railroad to issue these passes. The employee was entitled to the pass as a matter of grace, and it is crystal clear that the employee could not have compelled the carrier to issue him a pass by a legal proceeding if the carrier had refused to issue it. Thus, the pass was a "free" or "gratuitous" pass and the *Francis* v. *Southern Pacific Company* case, *supra,* is applicable as the Court of Appeals of Kentucky found in its opinion.

D. The Pass Issued to Mrs. Holeman Was a Gratuitous Pass.

Mrs. Holeman did not work for the Louisville and Nashville Railroad Company, and she received a pass upon the Railroad due to the fact that she was the wife of an employee. Again, *Francis* v. *Southern Pacific Company,* 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611, holds that such a pass is a gratuitous pass. Mrs. Holeman paid one-half fare for Pullman space. She paid no consideration at all to the Louisville and Nashville Railroad Company. The only case where a similar contention has been made is *Ulrich* v. *New York C. & H. R. Company,* 108 N. Y. 80, 15 N. E. 60, which holds specifically contrary to the present contention that the purchase of a Pullman seat makes one traveling on a pass a passenger for hire as far as the Railroad is concerned. As pointed out in the *Ulrich* opinion, the

money is actually paid to the Pullman Company for the space and not to the Railroad. Certainly, there is nothing inconsistent between free passage being furnished by the Louisville and Nashville Railroad Company and the payment for specific space to the Pullman Company. As stated in the *Ulrich* case, *supra*, at page 62:

> "The passenger could not have supposed that it did, for he not only used his pass for that purpose, but from the insignificance of the price paid for his seat, as compared with the regular fare for such a trip, the idea is repelled that he supposed he was thereby securing transportation also."

Here, the value of the Pullman ticket was $3.44 (T. R. 88). Certainly, there was no payment for transportation in any way. It is respectfully submitted that the agreement between the Louisville and Nashville Railroad Company and the Pullman Company concerning the operation of Pullman cars over its lines and inducing the Pullman Company to furnish such cars by making some agreement concerning possible losses suffered by the Pullman Company from such operation does not make Mrs. Holeman a paying passenger so as to vitiate the no liability provisions of her pass. The Pullman Company received the primary benefit of the half fare and, in addition, this sum was not paid for travel over the Railroad, but was paid merely for space. As noted in the syllabus to the *Ulrich* case, *supra*, the fact that a passenger traveling on a free pass was riding in a drawing room car for which he had

bought a ticket at the time he was injured, does not affect the immunity from liability for negligence secured to the Railroad by the provisions of the pass.

VI. CONCLUSION.

It is respectfully submitted that the law concerning gratuitous passes has been well settled by *Francis* v. *Southern Pacific Company*, 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611. The Petitioner has been unable to find any cases in which the decision of the Court of Appeals of Kentucky, in this case conflicts. It is respectfully submitted that for this reason and the reasons stated above the Petition for a Writ of Certiorari to the Court of Appeals of Kentucky should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, John P. Sandidge, Counsel for Louisville and Nashville Railroad Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on May ——, 1959, I served a copy of the foregoing Response to the Petition for A Writ of Certiorari on the Petitioners, Pearl Holeman and Pearl Holeman, Administratrix of the Estate of Floyd Holeman, by that day depositing a copy thereof in a United States Post Office in a duly addressed envelope, with first class postage thereon prepaid, addressed to her counsel of record, Parker W. Duncan, at 1032 College Street, Bowling Green, Kentucky.

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